IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SALES TAX REFERENCE NO.13 OF 2000

IN

REFERENCE APPLICATION NO.41 OF 1994

The Commissioner of Sales Tax,
Maharashtra State, Mumbai ..Applicant.

V/s.

M/s.Khosala Kesharwala ..Respondent.

Mr.Vinay Sonpal, Advocate for applicant.

Ms.N.R.Badheka, Advocate with Mr.B.C.Joshi for respondent.

CORAM : H.L.GOKHALE & J.P.DEVADHAR, JJ.

DATED : 16TH DECEMBER, 2005.

JUDGMENT (PER J.P.DEVADHAR, J.)

1. At the instance of the Commissioner of Sales Tax, the Maharashtra Sales Tax Tribunal, Mumbai has made this reference under section 61(1) of the Bombay Sales Tax Act, 1959 seeking a decision of this Court on the following question of law:-

"Whether on the facts and in the circumstances of the case, was the Tribunal justified in law in holding that saffron / kesar is not culinary and flavouring essence covered by Entry No.78 of Schedule C Part II to the Bombay Sales Tax Act, 1959, liable to tax at 15% but it is an ayurvedic medicine in natural form covered by Entry No.214 of the Notification issued under section 41 of the Bombay Sales Tax Act, 1959, liable to sales tax at 4% ? "

2. The respondent (hereinafter referred to as ‘the assessee’) is a registered dealer under the Bombay Sales Tax Act, 1959 (‘the BST Act’ for short). The assessee purchases kesar / saffron from Kashmir and sells it in the State of Maharashtra.

3. On 1/12/1990 the assessee made an application to the Commissioner of Sales Tax, Bombay under section 52 of the BST Act seeking determination of the question as to whether the sale of saffron in the State is exempt from the payment of sales tax. The determination sought was with reference to the sale bill No.69055 dated 23/11/1990 annexed to the said application. The said sale bill pertained to the sale of 10 boxes of saffron by the assessee to Puranchand & Sons, Kirana Merchants, Nanapet, Pune-2. According to the assessee, the saffron is an ayurvedic medicine in the natural form covered under entry No.214 of the

exemption Notification issued under section 41 of the BST Act, attracting sales tax at 4%.

4. The Deputy Commissioner of Sales Tax to whom the said application was assigned, heard the matter and by his order dated 20th August, 1991 held that saffron is not an ayurvedic medicine and as such, it is not covered by the scope of entry No.214 of the notification issued by the Government and that the saffron would be covered under entry No.78 of Schedule C Part II as "culinary and favouring essences." Accordingly, the Deputy Commissioner of Sales Tax held that the sale of kesar / saffron under sale invoice dated 23/11/1990 is liable to tax at 15% under entry No.78 of part II of Schedule C appended to the BST Act.

5. On appeal filed by the assessee, the Maharashtra Sales Tax Tribunal, at Bombay, by its Judgment dated 16th April, 1994 set aside the order of the Deputy Sales Tax Commissioner dated 20/08/1991 and held that the saffron sold by the assessee is an ayurvedic medicine in the natural form covered by entry No.214 of the notification issued under section 41 of the BST Act and is taxable at 4%. Hence this reference at the instance of the revenue.

6. Although Mr.Sonpal, learned counsel for the revenue sought to rely on various documents which were not produced before the authorities below, we have considered only those materials which were produced before the authorities below.

7. Mr.Sonpal, learned counsel for the revenue referred to entry C-II-13 wherein saffron has been specifically included along with spices during the period from 1-7-1981 to 31-8-1990. Thereafter, during the period from 1-5-1992 to 8-9-1992 saffron was specifically included under entry C-II-78 along with food dyes and colours, culinary and flavouring essences whether in a concentrated or diluted form. Accordingly, Mr.Sonpal submitted that even before the issuance of exemption entry 214 saffron was always considered to be an item of spice used in cooking as colouring and flavouring material and, therefore, saffron could not be considered as an ayurvedic medicine in the natural form covered under entry 214 of the exemption notification issued under section 41 of the BST Act on 25/6/1985.

8. Counsel for the revenue further submitted that the Tribunal was in error in holding that a saffron was an ayurvedic medicine in the natural form,

because, as held by the adjudicating authority, the saffron like turmeric, ginger, cloves etc. may have some medicinal properties but that itself would not make them ayurvedic medicines. He submitted that the adjudicating authority has referred to the book written by Raghuvanshi, on ayurvedic medicine wherein several day to day items like mangoes, pineapples, walnuts, sugarcane are also shown as items of ayurvedic medicines. He submitted that as held by the adjudicating authority, there is a basic distinction between the substances which are medicines themselves and substances which have medicinal properties. The fact that kesar has medicinal properties does not make it to be an ayurvedic medicine in the natural form covered under entry No.214 of the exemption notification issued under section 41 of the BST Act. The adjudicating authority has also quoted from the book written by Chopra which reads as under :-

> " In European medicines "saffron" is used to a very limited extent. If at all, it is used mainly in cookery as a colouring and flavour material."

. Counsel submitted that even in India saffron is mainly used in cookery as a colouring and flavouring material in the manufacture of Kesarbhaat, shrikand and other sweets. Therefore, for the purposes of sales tax saffron was included with spices under entry C-II-13.

He submitted that on deletion from entry C-II-13, the saffron would be appropriately classifiable under entry C-II-78 and the Tribunal was in error in holding that saffron would be covered under exemption entry 214 as an ayurvedic medicine in the natural form.

9. Ms.Badheka, learned counsel appearing on behalf of the assessee submitted that it is well settled in law that the burden of establishing that the goods of the assessee fall under a particular entry is upon the department and if the goods of the assessee falls under two entries, then the one which is beneficial to the assessee should be applied. She submitted that before the adjudicating authority evidence was led by the assessee to establish that kesar was an ayurvedic medicine in the natural form; whereas no evidence was led by the revenue to establish that kesar would fall under the entry C-II-78 as "culinary and flavouring essences." Accordingly, the counsel for the assessee submitted that without leading any evidence, it is not open to the revenue to contend that saffron is covered under entry No.C-II-78 or under the residuary entry.

10. Learned counsel for the assessee further submitted that before the adjudicating authority, the

assessee had produced classic authoritative book called "Indigenous Drugs of India", quotations from Aushadh Dravya Gyankhand" also a standard ayurvedic textbook and also the State Government Notification, being the enumeration by a "committee for standard and genuine ayurvedic herbs & drugs" appointed by the then Government of Bombay, wherein kesar is considered to be a drug. She also relied upon the article from "Dharma Yug" to show that in the trade parlance kesar is considered as ayurvedic drug. Accordingly, the learned counsel for the assessee submitted that saffron is squarely covered under Notification Entry No.214 issued under section 41 of the BST Act.

11. Learned counsel for the assessee further submitted that the Tribunal has considered all the aforesaid materials in detail and arrived at a conclusion that kesar is an ayurvedic medicine in the natural form covered under exemption entry No.214 issued under section 41 of the BST Act. Learned counsel for the assessee referred to para 17 of the Judgment of the Tribunal wherein there is a reference to the decision of the Apex Court in the case of **M/s.Vicco Laboratories V/s. Union of India** reported in **68 E.L.T.A-47**. The Apex Court in that case upheld the order of the High Court that Vicco Vajrajanti paste and

Vicco turmeric cream have to be regarded as ayurvedic medicines for the purpose of classification under the Central Excise Act. Accordingly, the counsel for the assessee submitted that kesar which is used in the ayurvedic preparations would be covered under exemption entry No.214 issued under section 41 of the BST Act. She submitted that like ayurvedic and unani drugs, kesar cannot be used by itself by swallowing it or eating it. Therefore, most of the ayurvedic drugs which are potent in the natural form are used either after powdering, grinding and taken along with honey, milk, water, ghee, butter, etc. Accordingly, she submitted that kesar which is used in preparations like kesari jeevan and other similar ayurvedic preparations is a ayurvedic medicine covered under exemption entry No.214 issued under section 41 of the BST Act.' Even if kesar is a colouring and flavouring agent, entry C-II-78 pertains to flavouring essences and not to flavouring agents and, therefore, kesar cannot be said to be covered under entry C-II-78.

12. Relying upon the decision of the Apex Court in the case of **Kamala Ganapathy Subramaniam and Anr. V/s. Controller of Estate Duty** reported in **(2002) 253 I.T.R. 692**, counsel for the assessee submitted that in a reference it is not open to this Court to re-

appreciate the evidence and, therefore, the decision of the Tribunal which is based on cogent evidence adduced by the assessee is liable to be confirmed. Relying upon the decision of the Apex Court in the case of **Commissioner of C.Ex. & Cus., Jaipur V/s. Gunwant Lal Godawat** reported in **2005 (185) E.L.T. 339 (S.C.)**, counsel for the assessee submitted that the conclusion arrived at the by the CEGAT with reference to the documents and materials on record cannot be said to be perverse or without basis and, therefore, no interference is called for in the present case. Relying upon the decision of the Delhi High Court in the case of **R. Dalmia V/s. Commissioner of income Tax (Central), New Delhi** reported in **113 I.T.R. 522** and the decision of this Court in the case of **Commissioner of Sales Tax V/s. Morarjee Gokuldas** reported in **67 S.T.C. 186**, counsel for the assessee submitted that the High Court cannot in a reference interfere with the findings on fact arrived at by the Tribunal merely because one or two admitted or proved facts are inconsistent with their findings and that the High Court in a reference, being not a Court of appeal, cannot embark upon re-apprisal of evidence and to arrive at findings of facts contrary to those of the appellate authority. Relying upon the decisions of the Apex Court, in the case of **Shree Meenakshi Mills**

Limited V/s. Commissioner of Income-Tax, Madras reported in **31 I.T.R.28**, learned counsel for the assessee submitted that the findings on a question of fact is open to attack when there is no evidence to support it or if it is perverse. In the present case, the Tribunal has arrived at a conclusion on the basis of the evidence on record and, therefore, no interference is called for. Relying upon the decision of the Apex Court in the case of **Hindustan Ferodo Ltd. V/s. Collector of Central Excise** reported in **106 S.T.C. 214**, counsel for the assessee submitted that the revenue having not lead any evidence to establish that saffron is a culinary and flavouring essence cannot contend that saffron is covered under entry C-II-78. Accordingly, it was submitted that the question referred to us be answered in favour of the assessee.

13. We have carefully considered the rival submissions. Before dealing with the rival submissions, it would be appropriate to set out the entries in the schedule to the BST Act and the exemption notification which are material for deciding the question raised in this reference. Schedule entry C-II-13 as it stood from time to time reads as follows:-

13.	Spices of all kinds including pepper, saffron but excluding those covered by entry 10 of Sch.A	6%	6%	1-7-1981 to 31-8-1990
13.	Spices of all kinds "including pepper but excluding saffron and those covered by entry 10 of Sch.A	6%	6%	1-9-1990 to 30-4-1992
13.(1)	Dhania, Methi and Suva when sold in powder form in sealed container and under a Registered Trade Mark.	2%	2%	1-5-1992 to 8-9-1992
(2)	"Spices of all kinds including pepper but excluding saffron, spices covered by sub-entry (1) and those covered by entry 10 of Schedule A.	6%	6%	1-5-1992 to 8-9-1992
13.	Spices of all kinds (including pepper, but excluding saffron and those covered by entry 10 of Sch.A.	6%	6%	9-9-1992 to 31-3-1994
13.(1)	Dhania, Methi and Suva when sold in powder form in sealed container and under a Registered Trade Mark.	2%	2&	1-4-1994 to 30-9-1995
(2)	Spices of all kinds including pepper but excluding spices covered by sub-entry ( ) and those covered by entry 10 of Schedule A.	6%	6%	1-4-1994 to 30-9-1995

The Schedule entry C-II-78 as it stood from time-to-time reads as follows :-

78.	Culinary and flavouring essence	15%	15%	1-7-1981 to 30-4-1992
78.(1)	Saffron	10%	10%	1-5-1992 to 8-9-1992
(2)	Food Dyes and Colours	10%	10%	1-5-1992 to 8-9-1992
(3)	Culinary and flavouring essences whether in a concen-trated or diluted form.	15%	15%	1-5-1992 to 8-9-1992
78.	Culinary and Flavouring essence	15%	15%	9-9-1992 to 31-3-1994
78. (1)	Food dyes and colours	10%	10%	1-4-1994 to 30-9-1995.

Exemption Entry No.214 issued under section 41 of the BST Act on 25/6/1985 reads as follows:-

214.	(i) Sales or purchases of Ayurvedic medicines and Unani medicines, whether in a prepared ready to use form or in the natural or harbal form, other than those medicines	To the extent to which the amount of sales tax, or as the case may be purchase tax, exceeds four paise in the rupee.
	(i) containing more than twelve per cent, by volume of alcohol and (ii) covered by entry 89 in Part II of Schedule C to the to the Act.	To the extent to which the amount of sales tax, or as the case may be purchase tax, exceeds four paise in the rupee.
	(iii) sales or purchase of	

Bulk Drugs used in the manufacture of medicines covered by entry 24(1) in part I of Schedule C to the Act.

[From 25.6.1985 to 30.4.1992 G.N.F.D. No.STA 1085/CR-97/RES-8 dt.29.7.1985].

14. On perusal of the aforesaid entries, it is seen that since 1/7/1981 saffron has been classified by the State Government as an item of spice and accordingly included it under entry C-II-13 for the purposes of sales tax. Spices are used to add flavour to the food preparations. While saffron was specifically covered under entry C-II-13, notification entry 214 was issued on 25/6/1985 granting exemption on sales or purchases of ayurvedic medicines and unani medicines, whether in a prepared ready to use form or in the natural form to the extent to which the sales tax or the purchase tax exceeds four paise in a rupee. As a result, all ayurvedic medicines in the natural form were exempted from payment of sales tax / purchase tax in excess of 4% from 25/06/1985.

15. It is pertinent to note that even after exemption entry 214 was issued on 25/6/1985, the assessee continued to pay tax on sale or purchase of saffron at the rate prescribed under entry C-II-13 and

it is only on deletion of saffron from entry C-II-13 with effect from 1-9-1990, the assessee sought to contend that sale or purchase of saffron is covered under entry 214 of the exemption notification issued under the BST Act and the same has been accepted by the Tribunal.

16. The contention of the assessee that after saffron was excluded from entry C-II-13 from 1/9/1990, the same would be covered under exemption entry 214 from 1/9/1990 is without any merit. If at all saffron was an ayurvedic medicine in the natural form, then, as per notification entry 214 the tax payable on sale or purchase of saffron from 25/6/1985 would be 4% and not the rate specified in entry C-II-13. The very purpose of issuing the notification entry 214 on 25/6/1985 was to give relief on sale or purchase of all ayurvedic medicines in the natural form on which higher rate of tax was payable under the different schedules to the BST Act. Therefore, the contention of the assessee that saffron would be covered under exemption entry 214 after its deletion from entry C-II-13 with effect from 1/9/1990 cannot be accepted.

17. The question, therefore, to be considered is whether, saffron is an ayurvedic medicine in the

natural form covered under entry 214 of the exemption notification issued under section 41 of the BST Act on 25/6/1985 ?

18. As rightly held by the adjudicating authority, there is a distinction between substances which are medicines themselves and the substances which have medicinal properties. Exemption entry 214 refers to substances which are medicines themselves and not to the substances which have medicinal properties. Therefore, the fact that saffron is also used in ayurvedic preparations like kesari jeevan etc. would not make it to be an ayurvedic medicine. What entry 214 refers to is the sale or purchase of ayurvedic medicines or unani medicines in a prepared form or in the natural form. Therefore, to fall under entry 214 the item itself must be an ayurvedic medicine. It is not the case of the assessee that the saffron is sold as an ayurvedic medicine. In fact, in the present case, the assessee has sold saffron to a kirana merchant. Therefore, the fact that the saffron is also used in the ayurvedic prepartions would not mean that saffron itself is an ayurvedic medicine.

19. As held by this Court in the case of **Kirloskar Pneumatic Co. Ltd. V/s. State of**

Maharashtra reported in **64 S.T.C. 420**, for determining the classification of an article under the schedules to the sales tax legislation, one has to look to the primary use of the article in question in the absence of any evidence of trade or common parlance. It is not in dispute that saffron is predominantly used in cooking as a colouring and flavouring material. Moreover, because of its predominant use in cooking as a colouring and flavouring material, the State Government since 1981 has classified saffron to be an item spice and accordingly, included it under entry C-II-13.

20. It was contended that the fact that saffron is used in cooking as a colouring and flavouring material cannot be a ground to hold that saffron is not an ayurvedic medicine in the natural form. Saffron is not used in food preparations and sweets as an ayurvedic medicine. There is no material on record to show that saffron has only therapeutical value. Even the books / notifications relied upon by the assessee which are referred to in the order of the Tribunal do not set out therapeutical value of saffron as an ayurvedic medicine. Therefore, merely because, saffron finds place in some of the books the Tribunal ought not to have held that saffron is an ayurvedic medicine in

the natural form. Similarly, the fact that saffron is now a days increasingly used in the ayurvedic preparations would not qualify saffron for being considered to be an ayurvedic medicine in the natural form. In our opinion, the decision of the Tribunal in holding that saffron is an ayurvedic medicine in the natural form even though it does not have any therapeutical value is patently erroneous and cannot be sustained.

21. Strong reliance was placed by the counsel for the assessee on the decision of the Apex Court in the case of Vicco Laboratories (supra). In our opinion, that decision is wholly distinguishable on facts. Firstly, the decision of the Apex Court in the case of Vicco Laboratories is based on the consent of both parties and it is not a decision on merits. Secondly, the said decision was in relation to the classification of the goods manufactured by Vicco Laboratories as a preparation of ayurvedic medicince and not to classification of ayurvedic medicines in the natural form. Thirdly, the Court in the case of Vicco Laboratories was not concerned with the issue as to which substances are ‘Ayurvedic medicines in the natural form’. Therefore, the decision of the Apex Court in the case of Vicco Laboratories (supra) does

not support the case of the assessee. Several decisions were cited before us by the counsel for the assessee regarding the powers of the Court in dealing with the reference application. There can be no dispute with the proposition of law laid down therein. But once it is found that the decision of the Tribunal is patently erroneous and is not borne out by the evidence on record, then the decision of the Tribunal will have to be reversed. Accordingly, we hold that the Tribunal was in error holding that saffron is an ayurvedic medicine in the natural form covered under entry 214 of the exemption notification issued under section 41 of the BST Act.

22. The next question to be considered is whether saffron on being excluded from entry C-II-13 would be covered under entry C-II-78 ? It was contended that the revenue has not adduced any evidence to establish that saffron falls under entry C-II-78. Entry C-II-78 pertains to culinary and flavouring essences. The adjudicating authority has held that in view of the fact that kesar / saffron is mainly used in cooking and also a colouring and flavouring agent, the same is classifiable under entry C-II-78 after 1-9-1990. The fact that saffron is used in cooking as flavouring material is not in dispute. The adjudicating authority

has also relied upon the book written by Chopra wherein it is stated that kesar is mainly used in cookery as a colouring and flavouring material. Therefore, on deletion from entry C-II-13, the saffron was appropriately classifiable under entry C-II-78 as culinary and flavouring essences. It was contended that the entry C-II-78 pertains to 'flavouring essences' and not to flavouring material. This contention has no merit because, commercial saffron is derived from thousands of saffron flowers and admittedly the saffron sold in the market cannot be consumed directly and is used in small quantities in food preparations. Therefore, saffron is nothing but a colouring and flavouring essence. Hence, no fault could be found with the decision of the adjudicating authority in classifying saffron under entry C-II-78.

23. It is pertinent to note that in the present case it is not the case of the assessee that after 1/9/1990 saffron falls in some entry other than entry C-II-78. The contention of the assessee is that on being deleted from entry C-II-13, saffron would be covered under exemption entry 214 issued under Section 41 of the BST Act. There is no merit in this contention. By the exemption notification tax payable on ayurvedic medicines in the natural form, covered

under different entries in the schedule to the BST Act is restricted to 4%. Therefore, to claim benefit under exemption 214, it must be shown that saffron is an ayurvedic medicine in the natural form and that the tax payable on saffron under the schedule to the BST is more than 4%. Only then, the benefit of the exemption notification entry 214 can be availed. In the present case, the assessee has failed to establish that saffron is an ayurvedic medicine in the natural form and the assessee has not adduced any evidence to show that saffron is covered under an entry other than entry C-II-78. In these circumstances, finding given by the adjudicating authority that because of its predominant use in cooking as a colouring and flavouring agent, saffron is liable to be classified under entry C-II-78 cannot be faulted.

24. For all the aforesaid reasons, we are of the opinion that the Tribunal was in error in holding that saffron is not classifiable under entry C-II-78 and erred in holding that saffron is an ayurvedic medicine in the natural form covered in exemption entry 214 issued under Section 41 of the BST Act.

25. Accordingly, the question referred to us is answered in the negative, that is in favour of the

revenue and against the assessee. Reference is disposed of accordingly, with no order as to costs.

sd/-

(H.L. GOKHALE, J.)

sd/-

(J.P. DEVADHAR, J.)